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IN THE

Supreme Court of the United States

October Term, 1971

No. 1579

OTIS L. BROWN, Director of the Department of Welfare and Institutions *et al.*,

Petitioners,

against

VIVIAN WOOLFOLK, *et al.*,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

BRIEF OF LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR CERTIORARI

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Interest of the *Amicus Curiae*

While the petitioners and respondents here are officials and residents of the State of Virginia and while the case involves construction of a statute of the State of Virginia, the decisions of the District Court and of the Court of Appeals for the Fourth Circuit have been cited and followed as persuasive precedent by Courts of other jurisdictions. In holding New York State's work referral amendments to the New York Social Services Law invalid as in conflict with the Federal Social Security Act, specifically those provisions relating to the WIN program (Work Incentive Program), and unconstitutional as in conflict with the

Supremacy Clause of Article VI of the Constitution of the United States, the United States District Court for the Western District of New York cited the lower Court decisions in this case as authority for its holding, although the state statutes were not the same. The State of New York is appealing that decision to this Court.

The decision in this case has been cited by Courts in jurisdictions other than New York and thus has an effect for beyond the interests of the parties to the case itself. In view of the far reaching effect of the decisions in this case, the *amicus* here urges this Court to accept jurisdiction for the purpose of construing the parameter of state authority to enact work referral programs for persons receiving public assistance in federally-aided categories.

ARGUMENT

Whether or not a statute conflicts with the Supremacy Clause of Article VI of the Constitution of the United States depends on whether Congress, expressly or by the extent of the Federal statute, has totally occupied the particular field. Where, as in the case of the WIN program, congress has provided for employment or training for only a minimal number of employable welfare recipients, it cannot have intended to so occupy the field of employment referral so as to bar State supplemental programs.

In 1971, the New York State Legislature enacted two bills providing for work referral programs and public works project employment for employable recipients of public assistance. Because of HEW objections, the public works employment provisions were not implemented as to recipients of Aid to Dependent Children (AFDC), but only as to the State's general assistance category (Home Relief

—HR), a non-federally assisted category. The work referral program generally required all unemployed employable recipients of public assistance, in both HR and ADC categories, who were not engaged in full-time vocational training programs to report semi-monthly to the State Division of Employment for job referral and manpower services. Those statutes became effective July 1, 1971.

An action was commenced in the United States District Court for the Western District of New York, by order to show cause, on July 1, 1971 seeking to invalidate New York's statutes on the ground that they violated the Thirteenth and Fourteenth Amendments to the Constitution of the United States, as well as that they conflicted with the Federal Social Security Act and thus, were in conflict with the Supremacy Clause. In its decision, dated July 28, 1972, the District Court in the New York case (*Dublino v. New York State Department of Social Services*) dismissed those causes of action which alleged a violation of the Thirteenth and Fourteenth Amendments but found that New York's work rules conflict with the Social Security Act and that the field of employment referral has been totally preempted as to Federally aided categories by the WIN program. In so holding, the Court stated:

> "Plaintiffs' second argument, that the Rules are preempted by the WIN program, has been successful in recent attacks on analogous state legislation in Virginia, see *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E. D. Va. 1971), aff'd 456 F. 2d 652 (4th Cir. 1972), and Oregon, see *Bueno* v. *Juras*, ___ F. Supp. ___ D. Ore. 1972)."

Significantly, the Oregon Court in *Bueno* based its decision on the lower court opinions in the instant case. The New York Court further cited the District Court opinion in the instant case wherein it was stated(325 F. Supp. at 1177):

> "Congress has endorsed the use of the threat of termination of subsistence level support as a means of forcing the acceptance of training or employment only when the job or the training meets specific federal requirements. State rules seeking roughly similar ends but differing sharply in means cannot coexist."

The New York Court thereupon found that it should follow the *Woolfolk* decision as enunciating the guiding general principle of law and held that New York's work rules conflicted with the Federal Act and that the entire field of employment and training of welfare recipients had been preempted by the WIN program.

Thus, all of the cases which have held state work referral programs to be invalid under the Supremacy Clause have been based on the decision in the Court below in the instant case. The issues presented to the Court in this case, therefore, extend far beyond the issue of the statute of a single state, but rather bear upon the implementation of the welfare programs and welfare reform legislation in all the states.

The primary allegation at issue in all these cases is simply that the Federal Social Security Act was intended to preempt the entire field of welfare legislation, particularly in the areas of employment referral and vocational training, and that state statutes and regulations in the same field cannot coexist. In this regard, it must be understood that a constitutional conflict does not automatically result from State and Federal legislation in the same fields. Preemption requires much more than this.

Thus, in *Huron Portland Cement Co.* v. *City of Detroit* (362 U. S. 440 [1959]), it was held that a Detroit ordinance designed for the elimination of air pollution was valid despite Federal inspection laws which prescribed the

method of construction of boilers to be used on sea-going vessels. This Court said (p. 446):

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. *Savage* v. *Jones,* 225 U. S. 501; *Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Maurer* v. *Hamilton,* 309 U. S. 598."

"It is well settled" as the First Circuit Court of Appeals said in *Chrysler Corp.* v. *Rhodes* (416 F. 2d 319 [1969]), that "where the State's police power is concerned preemption will not be presumed" (*Engineer* v. *Chicago R. I. & R. R. Co.,* 382 U. S. 423 [1966]).

The rule as to whether a Federal law has preempted from the State the right to regulate is that *the intention to supersede the State's police powers must be clearly evidenced by the Federal legislation.* The intention to regulate exclusively will not be implied unless the Federal and State laws are inconsistent (*New Mexico Board of Examiners* v. *Roberts,* 70 N. M. 90, 370 P. 2d 811 [1962]).

The requirement, that a Congressional intent to preempt a field of legislative concern must be clearly and unequivocally shown, was forcibly stated by this Court in *Schwartz* v. *Texas* (344 U. S. 199, 202-203 [1952]):

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "'The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State.' *Atchinson, T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, 392-393. See *Savage* v. *Jones,* 225 U. S. 501, 533.
>
> "'It should never be held that Congress intends to supersede or by its legislation suspend that exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' *Reid* v. *Colorado,* 187 U. S. 137, 148."

In that case, this Court held that the Federal Communications Act, which made the disclosure of information secured by wiretaps a Federal crime, did not prevent the use of wiretap testimony in State court proceedings, even when in Federal courts such information was not considered admissible. When, eventually, wiretap evidence was held to be generally inadmissible in State court proceedings, that was done not by holding that the Federal law preempted State law, but rather under other provisions of the Constitution.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul* (373 U. S. 132 [1963]), this Court held the test of preemption to be: Does the State regulation impair the Federal superintendence of the field? If there is no collision between the Federal and the State regulation, the Court said (p. 143):

> "Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the similarity of the standards.
>
> "The issue under the head of the Supremacy Clause is narrowed then to this: Does either the nature of the

> subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, require § 792 to yield to the federal marketing orders?"

The Court stated as a further test of preemption (p. 141):

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz,* 312 U. S. 52, 67. By that test, we hold that § 792 is not such an obstacle; there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to pre-empt the field."

And additionally (p. 142):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

The Federal Social Security Act does not specifically preempt the field of social welfare legislation by prohibiting state legislation in the field. In fact, the Act establishes only minimum federal requirements for State plans of assistance to certain specific categories of persons in need of assistance. That it does not cover the entire field of welfare is apparent from the fact that there are categories of aid which are totally supported (such as Home Relief) because the Congress did not see fit to legislate as to all needy persons. More importantly, this is not the first case in which the issue of preemption has been raised in regard to the Federal Social Security Act and State statutes or regulation. Both the Federal and the State

courts have considered the issue of preemption in the past, with almost uniform results.

In *Snell* v. *Wyman* (281 F. Supp. 853 [S. D. N. Y., 1968], affd. 393 U. S. 223), the Court considered a New York statute which provides for recovery of previously paid welfare benefits from assets of recipients, such as equity in real estate, bank accounts, proceeds of lawsuits or insurance policies, etc. The Court there held that the Federal Social Security Act did not prohibit such legislation, either directly or by implication, and that the State statute was not rendered invalid simply because it did not accord with the social philosophy of either the plaintiff or the Court (281 F. Supp. at p. 863).

Less than two years ago, this Court specifically held that the Federal Act did not preempt the field of welfare legislation, even in areas covered by the Federal Act itself (*Dandridge* v. *Williams*, 397 U. S. 471). In that case, holding valid a Maryland statute which set a maximum limit on the number of children in a family for which ADC would be paid, the Court held as to the power of the States to legislate (397 U. S., p. 478)

> "In *King* v. *Smith, supra* (392 U. S. 309), we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' *Id.*, at 334. We described the AFDC enterprise as 'a scheme of cooperative federalism,' *id.*, at 316, and noted carefully that '(t)here is not question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *Id.*, at 318-319. * * * Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds."

Only the instant case, relied upon by the Courts in *Dublino* and *Bueno*, has held a state work requirement to conflict with the Federal Act. Even in this case, the District Court specifically stated (325 F. Supp. at p. 1170):

> "The Court is not ruling that persons receiving assistance are without obligation to accept employment."

Although the Court in this case limited its finding of invalidity of the state statute only to those areas in which the WIN program is in effect, we submit that the Court's further finding, that employment cannot be compelled where recipients are deemed inappropriate for WIN referral due to remoteness from a WIN project, was erroneous and extended the impact of the decision far beyond the facts of the particular case. The Federal guidelines for WIN provide for the establishment of WIN projects only in areas where there are 1100 or more potential WIN referees. Thus, areas with less than 1100 employable public assistance recipients would most probably not have such a project established and the recipients in that area would be deemed inappropriate for WIN referral because of remoteness from a project. To hold that such persons could not be referred to available employment, solely because they are inappropriate for WIN because of remoteness, is contrary to the express purpose of the Federal Act itself, that is, to assist welfare recipients to attain self-sufficiency and independence and to assist them in moving from welfare rolls to payrolls.

Additionally, New York's experience with the WIN program clearly shows the lack of Congressional intent to preempt the entire field of employment placement. In New York, the WIN program is restricted geographically in the sense that it exists in only 12 of the State's 64 social services districts. *The actual designation of only 12 dis-*

tricts to operate with the WIN program was made by the Federal Secretary of Labor. The request of the New York State Department of Social Services that the United States Labor Secretary expand the WIN program by designating additional social services districts for the program has been denied. Unlike New York State's Social Services Law work referral provisions, the WIN program by federal design is restricted to specific areas of the State and as such is available only to very limited numbers of ADC recipients.

The 12 social services districts which have a WIN program in operation are also limited to a total slot allocation of 16,800. Initially, when the Program was implemented in New York in 1968 there were 14,800 slots authorized. In April 1972, the slot allocation was increased to the present level of 16,800. Under the revised WIN program, effective July 1, 1972, it is estimated there are 75,000 registered ADC recipients who are potential WIN participants but the program will not have the capacity to accommodate more than a fraction of this number. Clearly then, we must turn to other manpower programs, such as our own work referral program, if we are to meet our responsibilities, mandated under the Federal Social Security Act, to help clients become self-supporting. The disparity between the effectiveness and scope of the Federal and State programs is apparent from the fact that in the period from January through June, 1972 there were a total of 2,657 job placements under the WIN program, as compared with a total of 5,323 placements in the same period under the State's work referral program, even though the WIN program is operating in those districts having 90% of the total number of welfare recipients in the State.

In Fiscal 1971, the New York State Department of Social Services referred 17,511 individuals for participation in

the WIN program. However, in that fiscal year, the Federal government allowed only 9,600 opportunities for enrollment in the WIN program for New York State. In addition, since the State work requirement has been enacted, referrals to the State Employment Service increased twelvefold. Between November, 1971 and June, 1972, there have been approximately 125,000 referrals within the scope of seven months. Compare that figure with the yearly total referrals under the Federal WIN program:

Fiscal year	68-69	9,127
	69-70	16,992
	70-71	17,511

Not only do the Federal and State acts not conflict, they are in fact compatible in purpose and intent. This is apparent from an examination of the materials related to both programs.

The Federal Social Security Act provides that appropriations under the ADC program are made, in part, for the purpose of helping parents and relatives of needy dependent children to "attain or retain capability for the maximum self-support and personal independence" (42 U. S. C. A. § 601). State plans are specifically authorized to deny eligibility to persons who deliberately terminate employment, reduce income, or refuse job offers in the month preceding the computation of assistance (42 U. S. C. A. § 602 [a(8)]). The Federal Act, under the WIN program, provides for non-referral to that program of persons who are ill, incapacitated, of advance age, a child in full time school attendance, a person whose presence is required in the home to care for persons who are ill or incapacitated, or a person who is so remote from a WIN project as not to be able to effectively participate.

In the Congressional presentation of the Social Security Act amendments which became Public Law 92-223, Senator

Long made some significant observations on the purpose of the work referral program under the Federal Act (Congressional Record, December 14, 1971, p. S21641):

> "One final word on this amendment. As the Senate knows, we will be legislating next year on extensive changes in the welfare system. I have views of my own, as I am sure other Senators do, about what we might do to improve the welfare programs; but in the meantime, I am pleased to see the Congress take this forward step in improving the work incentive program under existing law so that it can be more effective in enabling welfare recipients to become employed. As we know from a number of studies that have been conducted by the Department of Health, Education, and Welfare, most adults in families receiving welfare would prefer to work rather than remain on welfare. It is my hope that the amendments contained in the conference report will help these recipients in their efforts to become independent—efforts that are all to often frustrated today by the welfare system that is supposed to be helping them."

The guidelines issued by the Department of Health, Education, and Welfare for the Work Incentive program clearly express the purpose of that program to be one of work referral (§ 31):

> "The purpose of the Work Incentive Program is to provide an opportunity for certain members of AFDC families, 16 and over, to be placed in paid employment immediately or to secure the necessary services to prepare them to get and hold jobs in order to become self-supporting or capable of supportng their families.
>
> "Added to the obvious desirability of an adequate income is the recognition that employment is a necessary and healthy part of family living. Many of the persons served in this program have a sense of isolation from the mainstream of American life. By entering the world of work successfully, such individuals may see themselves in a new light in relation to their own sense of worth and their standing in the commu-

> nity. The family head who gains this new respect for himself cannot help but imbue his family with it and set a pattern for a new outlook and independent living."

The State programs, too, aim at these same objectives.

We, therefore, submit to this Court that the issues presented in the application of the petitioner are sufficiently significant and of such broad application as to warrant the granting of the petition for certiorari.

CONCLUSION

The petition for certiorari should be granted.

Dated: September 23, 1972.

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